

IN THE COURT OF APPEALS OF IOWA

No. 7-280 / 06-0609
Filed June 13, 2007

DAMIEN CARL GOVAN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Scott County, J. Hobart Darbyshire,
Judge.

Damien Govan appeals the district court's denial of his application for
postconviction relief. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan J. Japuntich,
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas Tauber, Assistant Attorney
General, William E. Davis, County Attorney, and Jerry Feuerbach, Assistant
County Attorney, for appellee State.

Considered by Huitink, P.J., and Zimmer and Vaitheswaran, JJ.

VAITHESWARAN, J.

Damien Govan was apprehended after he was seen in a grocery store stuffing family packs of pork steaks into his clothing. The State charged him with second-degree robbery and a jury found him guilty as charged. Iowa Code § 711.3 (1997). Following a direct appeal that was dismissed as frivolous, Govan filed an application for postconviction relief. The district court issued a ruling that was appealed and considered by our court. We reversed and remanded, concluding that the district court erred in resolving the application on procedural grounds. *Govan v. State*, No. 01-0813 (Iowa Ct. App. Sept. 11, 2002). On remand, the district court held another hearing, addressed the merits of Govan's allegations, and again denied the application for postconviction relief.

Govan appealed this ruling, raising a single issue: whether appellate counsel was ineffective in failing to challenge the sufficiency of the evidence to support the jury's finding of guilt. To decide this issue, we must examine the merits of the underlying claim. *State v. McDowell*, 622 N.W.2d 305, 307 (Iowa 2001). If a challenge to the sufficiency of the evidence would have proved unsuccessful, Govan's ineffective assistance of counsel claim necessarily fails. *State v. Hoskins*, 711 N.W.2d 720, 731 (Iowa 2006).

The jury was instructed that the State would have to prove the following elements of second-degree robbery:

1. On or about the 13th day of October, 1998, the defendant had the specific intent to commit a theft.
2. In carrying out his intention or to assist him in escaping from the scene, with or without stolen property, the defendant:
 - a. Committed an assault on Donald [K]onklin; or

b. Threatened Aric Wouters with or purposely put Aric Wouters in fear of immediate serious injury.

A reasonable juror could have found the following facts. An employee of a Davenport grocery store observed a man, later identified as Govan, placing packages of meat under his coat. The employee told the store owner, Donald Konklin, who found Govan at the front of the store, past the cash registers. Konklin confronted Govan. The two men began to argue. During the argument, Govan either dropped or surrendered the packages of meat. He attempted to leave the store but was impeded by Konklin. In the ensuing struggle, Govan shoved Konklin. Konklin fell backwards, hit his head on the floor, and suffered a concussion. Govan ran out of the store.

Meanwhile, another store employee, Aric Wouters, saw Konklin on the floor with Govan standing above him. Wouters followed Govan outside. Govan turned around and put his hands up as if to hit Wouters. Police subsequently apprehended Govan.

This evidence was more than sufficient to support the jury's finding of guilt. Contrary to Govan's assertion, the fact that he relinquished the packages of meat before leaving the store does not negate the "intent to deprive" element, as our legislature has provided that concealing un-purchased items is material evidence of this element. See Iowa Code § 714.5. See also *State v. Humburd*, 178 N.W.2d 318, 318-19 (Iowa 1970) (finding sufficient evidence to support a shoplifting charge where security guard observed defendant take items from grocery store shelves and place them in her purse, but a later search of the purse did not disclose the items allegedly stolen). Cf. *State v. Morris*, 677

N.W.2d 787, 788 (Iowa 2004) (finding evidence insufficient to establish intent to permanently deprive owner of a truck).

On our de novo review of the trial record, we conclude there is no reasonable probability that counsel would have prevailed had he raised a challenge to the sufficiency of the evidence. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984). Accordingly, we affirm the district court's denial of Govan's postconviction relief application.

AFFIRMED.